2009

State of Utah v. Jullyn Doyle : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff / Appellee	:	
vs.	:	Case No. 20090148-CA
JULLYN DOYLE,	:	
Defendant / Appellant	:	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT,
STATE OF UTAH, FROM THE JUDGMENT, SENTENCE AND COMMITMENT
OF THE HONORABLE DAROLD J. McDADE, AFTER CONVICTION FOR
CONTROLLED SUBSTANCE VIOLATIONS

MARK SHURTLEFF
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Counsel for Appellee

MICHAEL BROWN (12457)
MICHAEL D. ESPLIN (1009)
Esplin & Weight
290 West Center Street
P.O. Box L
Provo, Utah 84603
Telephone: (801) 373-4912

Counsel for Appellant

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate-review jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e) (2009).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred by denying Defendant's Motion to Arrest Judgment when the State's attorneys committed prosecutorial misconduct by failing to correct what was perjured testimony by a material witness. (R. 473: 304; 395). A trial court's decision regarding a defendant's motion for mistrial based on prosecutorial misconduct is reviewed for an abuse of discretion. State v. Pritchett, 2003 UT 24, ¶ 10, 69 P.3d 1278. "This standard is met if 'the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant.'" Pritchett, 2003 UT 24, ¶ 10 (internal quotations omitted). And the "overriding concern is that defendant received a fair trial." Pritchett, 2003 UT 24, ¶ 10. This issue was preserved in arguments made during trial (R. 473: 304-) and in a motion to arrest judgment (R. 395, 373-71).

2. Whether the trial court erred in allowing prior bad acts of Doyle involving drug use to be admitted as evidence under Rules 404(b) and 403 of the Utah Rules of Evidence. The trial court's decision to admit evidence of other crimes, wrongs, or bad acts is reviewed for an abuse of discretion. State v. Fedorowicz, 2002 UT 67, ¶ 24, 52 P.3d 1194; *see also* State v. Decorso, 1999 UT 57, ¶ 18, 993 P.2d 837. This issue was preserved in a written motion and in oral arguments to the trial court (R. 114-12, 474: 3-).

CONTROLLING CONSITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 403, Utah Rules of Evidence

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b), Utah Rules of Evidence

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

Nature of the Case

Jullyn Doyle appeals from a jury's conviction of possession of a controlled substance, a third-degree felony, in violation of Utah Code Ann. §58-37-8(2)(a)(i) and

possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. §58-37a-5(1) before the Honorable Darold J. McDade of the Fourth District Court.

Trial Court Proceedings and Disposition of the Case

The State charged Defendant by Information, dated July 6, 2007, with one count of Possession or Use of Methamphetamine in a Drug Free Zone, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i); and one count of Possession of Drug Paraphernalia in a Drug Free zone, a class A misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1). (R. 1). Subsequent to the preliminary hearing held on October 15, 2007, the trial court found probable cause and bound both charges over for trial. (R. 39-41). Defendant entered pleas of not guilty on both counts. (R. 39-41).

Defendant filed a Demand for 404(b) Evidence on November 15, 2007. (R. 44). At the pre-trial conference, the parties discussed issues regarding discovery and evidence to be presented at trial. (R. 471). Defendant notified the court and filed a Motion in Limine regarding the admission of hearsay statements and the exclusion of possible Rule 404(b) evidence. (R. 471: 6-12; 101-02). The following day, December 4, 2007, the State filed its Notice of Intent to introduce 404(b) evidence at trial. (R. 110). That same day, however, Defendant and the State stipulated to continuing the trial because results of a fingerprint test may not have been available by trial. (R. 117).

On December 20, 2007, the State filed its response to Defendant's Request for Discovery and Specific Discovery and its Memorandum in Opposition to Defendant's Motion in Limine on December 21, 2007. (R. 196; 201). The State then filed its

Response to Defendant's Motion in Limine [To Exclude] Prior Bad and Defendant filed her Reply. (R. 210; 221). On February 4, 2008, at oral argument on Defendant's Motion in Limine regarding possible Rule 404(b) evidence, the trial court denied Defendant's motion. (R. 474). Defendant filed a Notice of Petition for Permission to Appeal From the trial court's Interlocutory Order on March 18, 2008. (R. 247). That Petition was ultimately denied by this Court on May 2, 2008. (R. 254).

At pre-trial conference on June 23, 2008, the trial court granted Defendant's motion to sever Defendant's case from her co-defendant, Jorge Lopez-Navarette and the final pre-trial conference was set for September 15, 2008. (R. 260-262). On September 15, 2008 the State filed an amended Information, modifying count one to Possession or Use of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), and count two to Possession of Drug Paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1). (R. 288).

Defendant filed her Motion in Limine to exclude evidence of a 2007 DUI and an associated crime lab report. (R. 294). That motion was denied the morning of trial on September 24, 2008. (R. 312). On September 25th, the second day of trial, Defendant submitted a written Motion to Dismiss. (R. 313-321). That motion was discussed in chambers and denied. (R. 326). The jury convicted Defendant of both counts of the Information as charged. (R. 322-26).

Defendant filed a Motion to Arrest Judgment and sentencing is continued to January 12, 2009. (R. 395; 373-71). On January 12, 2009, the trial court addressed

Defendant's Motion to Arrest Judgment and sentencing. (R. 444-48). The trial court denied Defendant's motion. (R. 444-48).

Doyle was sentenced according to statute on each count, but the prison/jail time was suspended except for 90 days to run consecutive with any other commitments, thirty-six months supervised probation and a fine of $975.00. (R. 444-48). Defendant filed a timely Notice of Appeal on February 9, 2008. (R. 460).

STATEMENT OF FACTS

A. Testimony of Brandon Johnson

Brandon Johnson is a deputy with the Utah County Sheriff's Office and is also a member of the Utah County Metro SWAT team (R. 472: 126, 127). On June 28, 2007 he participated with the SWAT team on the execution of a no-knock, nighttime search warrant inside a trailer (R. 472: 132).

The team deployed two audio distraction devices outside the residence before entering the trailer (R. 472: 133). Johnson was the last one "through the door" (R. 472: 133). He walked into the living room, saw a small child and picked her up (R. 472: 135). They were momentarily attacked by a pit bull before he took the child outside (R. 472: 135).

Outside he tried to calm the child down, letting her know they were police officers and that she was safe (R. 472: 135-36).

B. Testimony of Shantel Cuenca

Shantel Cuenca is an inmate at the Utah State Prison, serving a sentence for possession of a controlled substance with intent to distribute (R. 472: 142).

In June of 2007 she was living in a trailer in Springville (R. 472: 142). She lived with approximately six other individuals (R. 472: 143-44). Cuenca sold methamphetamine out of the residence beginning in February of 2007 (R. 472: 145-46). On the night of June 28, 2007 she was at home with approximately 13-14 other people (R. 472: 143). One of her daughters was also present at that time (R. 472: 149).

That night there was a "raid" and police kicked down her doors and entered the trailer (R. 472: 146). At the time she was in the back bedroom (R. 472: 146). She had just finished selling "some stuff" and was smoking methamphetamine on her bed with "Nikki (Leticia)..., Jullyn and George (Jorge Navarette)" (R. 472: 147. 148). That night she had sold some drugs to Nikki (R. 472: 160-61).

When asked if she saw Jullyn, the defendant, smoke meth, she said, "As I recall, yes" (R. 472: 148). There was a methamphetamine pipe that everybody smoked from, including Doyle (R. 472: 158-59, 164). Cuenca testified that Doyle had purchased methamphetamine from her before (R. 472: 151).

When the noise distractions went off, everybody "hit" the floor (R. 472: 151). Cuenca grabbed the methamphetamine, which was out in the open on a little refrigerator next to her bed (R. 472: 151-52, 162). She also had drugs underneath her mattress and in her purse (R. 472: 152).

Sometime during the search, Cuenca heard an officer mention a "bag that was in between Jullyn and George" (R. 472: 153). Drugs were also discovered inside a Doritos

bag on her bed (R. 472: 153-54). Cuenca testified she "had no clue what was in [the bag], but [she] claimed everything in the home" (R. 472: 153). Later she testified that the Doritos bag belonged to an individual who was on the porch at the time of the raid (R. 472: 162).

Cuenca told police that Doyle was at the residence to "pick up my daughter" (R. 472: 155). Cuenca acknowledged testifying earlier at the preliminary hearing (R. 472: 155). At that time she testified again that Doyle was there to "pick up my five-year-old daughter" and that Doyle was "back in my room to pick up some money for me" (R. 472: 156). She did not mention that Doyle was smoking methamphetamine at that time because "no one asked" (R. 472: 156, 169). She also testified that she could not recall police asking if anyone was smoking at the time the warrant was executed (R. 472: 162).

Cuenca testified that she was convicted of possession with intent to distribute in this case and in another case (R. 472: 157). In addition, the following exchange occurred between Cuenca and one of the prosecutors, Ryan Peters:

PETERS: Were you ever given a deal on your charges for—in exchange for your testimony today?

CUENCA: No.

PETERS: Has anyone ever asked you to testify in a specific way?

CUENCA: No, I always told everybody I wouldn't lie

(R. 472: 158).

A similar exchange occurred on cross-examination:

DODD: And it's your testimony that the State didn't offer you a deal to testify against Ms. Doyle?

CUENCA: Nope.

DODD: You've been convicted since then?

CUENCA: I have....

DODD: How many separate inc—at least two separate incidences that you've been convicted for felonies?

CUENCA: Yes.

DODD: What were those incidents?

CUENCA: Well, no, there's been three....

DODD: ... Did you take deals on those, or did you take those to trial like we're doing today?

CUENCA: Nope, I'm on a five to life.

DODD: So you actually took a deal, you pled guilty?

CUENCA: Yeah, pled guilty to them.

DODD: All right, and the State didn't offer you a deal at that time?

CUENCA: Nope.

DODD: Okay. So you're doing this just—why are you testifying today?

CUENCA: Everyone's askng me to.

DODD: Who's "everyone"?

CUENCA: The prosecutor, you

(R. 472: 166-68).

C. Testimony of John Barson

Provo City Police Officer John Barson is currently assigned to the Utah County Major Crimes Task Force (R. 472: 176). Although he has received past training in the area of drug recognition, he is not currently certified as a Drug Recognition Expert (R. 472: 176).

In June of 2007 he was also assigned to the task force and was investigating Shantel Cuenca in regards to possible drug trafficking (R. 472: 179, 216). He conducted surveillance on her home in Springville and eventually served a search warrant on her residence at approximately 11 p.m. on June 28, 2007 with assistance from the Utah County SWAT team (R. 472: 180, 182).

He entered the trailer after it had been secured (R. 472: 182-83). Three other individuals were in the master bedroom seated on the bed—including Cuenca, Nikki and a male (Jorge) (R. 472: 187, 190). Located on the floor between Doyle and Jorge was a small, clear plastic baggie that contained methamphetamine (R. 472: 188, 190). It was "within inches of her foot" (R. 472: 190).

There was a "strange chemical odor in the air" of the master bedroom (R. 472: 195). Barson testified that he associated the smell with freshly burnt methamphetamine (R. 472: 195, 196). Doyle objected to this testimony and requested information as to Barson's training in regards to methamphetamine and its odor (R. 472: 195). Barson testified that he attended a 60-hour training in how methamphetamine is made, and that in addition, he has "been in numerous homes and vehicles where methamphetamine was

being or had just been smoked; and this was similar to those odors" (R. 472: 196). He also testified that the air was hazy (R. 472: 196).

Drugs and paraphernalia were also found on the bed between the mattress and the box springs, on a night stand in the room (pipe or bong), on Cuenca's person, and in a Doritos bag on the bed (R. 472: 197). Barson also saw a fragment of a glass meth pipe with residue on it on the floor of the master bedroom (R. 472: 198). Cuenca claimed ownership of the drugs except for "the stuff on the floor" (R. 473: 247).

Barson subsequently interviewed Doyle in one of the other bedrooms (R. 472: 203). Barson testified she was "extremely confrontational, very verbally aggressive"; and she was physically agitated (R. 472: 203, 204). She was moving constantly and had a "very loud voice, yelling, a lot of—a lot of mannerisms and physical attributes of someone that may have been under the influence of a central nervous stimulant like methamphetamine" (R. 472: 204). Doyle objected to this last testimony and asked that it be stricken because Barson was not qualified to make such an assumption in regards to being a drug recognition expert (DRE) (R. 472: 204). The trial court sustained the objection and ordered that statement stricken (R. 472: 204).

Barson terminated the interview due to her behavior. However, Doyle subsequently asked to speak with him approximately 30 minutes later (R. 472: 205). Doyle told him that "she knew that there was methamphetamine in that bedroom. She stated... that she knew it was being prepared to be consumed" (R. 472: 206). Doyle also told him that she was there to pick up Cuenca's children (R. 472: 207). Doyle also denied that the methamphetamine and paraphernalia belonged to her (R. 472: 211).

On the second day of trial, Barson also testified (R. 473: 233-). Barson testified that he had arrested "hundreds" of individuals in DUI and possession cases who were later confirmed to have been on methamphetamine while he observed them (R. 473: 234-35). Doyle again objected to this testimony (R. 473: 235). The trial court again sustained the objection (R. 473: 236-37). However, Barson was subsequently allowed to testify to the physical manifestations or behaviors of individuals under the influence of methamphetamine or other central nervous system stimulants: "constant movement, lots of hands gestures. There's bruxism, which is flexing the muscles in the jaw, grinding of the teeth, constant talking, loud voice, aggressive, assertive behavior that's not normal, physically aggressive behavior" (R. 473: 238). Barson also testified over objection that Doyle "was verbally aggressive, physically animated. She exhibited many of the symptoms that I, per my experience, have associated with methamphetamine use" (R. 473: 240). Barson concluded there was no need to obtain a blood draw from Doyle because it was "obvious" that she "was under the influence of methamphetamine at that time" (R. 473: 241).

D. Testimony of Roy Edwards

Officer Roy Edwards assisted Barson with the execution of the search warrant (R. 473: 256). He was assigned to search the master bedroom (R. 473: 257). He found four people sitting on the bed, all in custody (R. 473: 258). He also immediately noticed a meth pipe, and a little baggie of meth on the floor (R. 473: 258). A bag of methamphetamine was also found on Cuenca's person (R. 473: 259). Cuenca also informed the officers there was more meth in a Doritos bag on the bed (R. 473: 261).

After the four individuals were taken to another room, Edwards fund cash and more bags of methamphetamine under the mattress (R. 473: 262). He testified that the Doritos bag and the meth on the floor were within Doyle's reach (R. 473: 267).

E. Testimony of Dennis Chapman

Utah County Sheriff's Deputy Dennis Chapman testified that on February 9, 2006 he initiated a traffic stop on a vehicle driven by Doyle (R. 473: 271). He found her behavior—nervousness, twitching, shaking, inability to sit still—suspicious and so he questioned her about methamphetamine use (R. 473: 272-73). Chapman testified that Doyle admitted to using "meth recently" and that "she couldn't afford to purchase meth on her own. So she smoked meth whenever she got a chance" (R. 473: 273). Urine and blood samples were obtained from Doyle at that time and methamphetamine was found to be in her system (R. 473: 273-74).

F. Testimony of Anna Shide

Anna Shide is a forensic scientist with the Bureau of Forensic Toxicology (R. 473: 285). She testified that she tested a blood sample collected from Doyle on August 29, 2007 that was positive for methamphetamine (R. 473: 291-93).

G. Testimony of Gunda Jarvis

Gunda Jarvis testified that she was Shantel Cuenca's court appointed attorney (R. 473: 336-37). Defense Exhibits 1 (Fourth District Case Number 081401181) and 2 (Fourth District Case Number 081401078) are Cuenca's Statements Before Pleading Guilty in the cases Jarvis represented her (R. 473: 341, 344-45). In Exhibit 1, Cuenca was originally charged with a first degree felony that was reduced to a second degree

felony (R. 473: 343).[1] In Exhibit 2, Count I was amended to a first degree without mandatory prison time (R. 273: 346). Cuenca also admitted to Count III (false information, a class C misdemeanor) and the remaining charge was dismissed (R. 473: 345, 346). In each case, a condition of the plea agreement, entered into on May 5, 2008, Cuenca agreed to testify against Doyle (R. 473: 345; Defense Exhibits 1 and 2). Jarvis testified that if Cuenca was to testify that she did not receive a deal in exchange for her testimony against Doyle, that would be false (R. 473: 348).

SUMMARY OF ARGUMENT

Under the Utah and Federal Constitutions, criminal defendants are entitled to due process of law, in that their right to a fair trial is inviolable. Here, Defendant asserts that the State's actions at trial, but also throughout the proceedings, fundamentally impaired her right to a fair trial and the trial court erred by abusing its discretion in not granting Defendant's Motion to Arrest Judgment because of the State's conduct.

Although the State is "charged with vigorously enforcing the laws... [it has an] even higher duty to see that justice is done." State v. Walker, 624 P.2d 687, 691 (Utah 1981). Thus, the State "may strike hard blows" in order to see that justice is done; it may not, however, "strike foul ones." State v. Saunders, 1999 UT 59, ¶ 31, 992 P.2d 951. Here, the State struck foul blows.

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[1] The court docket for this case also shows that two charges were dismissed: possession of a dangerous weapon by a restricted person, a third degree felony; and possession of drug paraphernalia, a class A misdemeanor.

First, and foremost, the State failed in its duty to correct false testimony. Here, the State's material witness – Shantel Cuenca – testified that Defendant had unlawfully consumed a controlled substance because she was involved in the unlawful activity too. However, during direct examination, the prosecutor questioned Ms. Cuenca about whether she had received any plea deals for her testimony. Ms. Cuenca answered no. Coincidentally, however, Ms. Cuenca had in fact received a plea deal, specifically in exchange for her testimony against Defendant. And, the prosecutor – Mr. Ryan Peters – was fully aware of this fact because he had authorized Ms. Cuenca's plea deal. Despite Mr. Peter's knowledge that Ms. Cuenca's testimony regarding the plea deal was false, he failed to correct it. Thus, Mr. Peters committed prosecutorial misconduct in failing in his duty to correct patently false testimony.

Second, the State failed to disclose crucial evidence within a reasonable time before trial. Several months before trial, defense counsel specifically requested that the State provide evidence of any plea offers to any co-defendants, which included Ms. Cuenca. At the time of the request, no offer was made to Ms. Cuenca. However, when the offer was eventually made, the State failed in its duty to provide what is obviously exculpatory, or at the very least, mitigating impeachment evidence.

In addition, this Court should reverse Doyle's conviction based on the trial court's error in admitting evidence of other bad acts under Rules 404(b) and 403 of the Utah Rules of Evidence. The other acts were not admitted for appropriate non-character purposes. They were admitted to establish character which conforms with the actions

alleged in the current case, and their prejudicial effect substantially outweighed any probative value.

ARGUMENT

I. In Failing to Grant Defendant's Motion to Dismiss After the State's Attorneys Committed Prosecutorial Misconduct by Failing to Correct False Testimony, the Trial Court Abused its Discretion

Defendant asserts the trial court abused its discretion by not granting Defendant's Motion to Arrest Judgment, which was based on the State's offering of and failure to correct perjured testimony by a material witness – Shantel Cuenca. Accordingly, Defendant will show that the standard of review, which is high in that it requires an abuse of discretion on the part of the trial court, is satisfied here. State v Pritchett, 2003 UT 24, ¶ 10.

Consequently, Defendant respectfully requests that this Court dismiss the case based on the trial court's abuse of discretion for not granting Defendant's motion to dismiss in light of the State's blatant and unethical misconduct, which substantially impaired the Defendant's Due Process right to a fair trial. See, U.S. Const. Amend. V; Utah Const. Art. I, § 7, see also, Lucero v. Kennard, 2005 UT 79, ¶ 38 n. 7, 125 P.3d 917 ("a court must dismiss a case with prejudice in instances where prosecutorial misconduct is so severe that lesser sanctions could not result in a fair trial.").

A. The State Committed Prosecutorial Misconduct By Consciously Failing to Correct the False Testimony of Shantel Cuenca, a Material Witness

"[W]hen a prosecutor is aware that testimony is false, he or she has a duty to correct the false impression; failure to do so requires reversal 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" State v. Gordon, 886 P.2d 112, 116 (Utah Ct. App 1994) (quoting Walker v. State, 624 P.2d 687, 690 (Utah 1981)). And, as this Court added, "[t]his applies even if the prosecutor unwittingly introduced the false testimony...." Gordon, 886 P.2d at 116. Here, the State relied on patently false testimony and failed to correct it, which in turn could have affected the judgment of the jury.

The State offered testimony from a material witness which the State knew to be false and failed to comply with its duty to correct that falsehood. More than one year before the two-day trial, the preliminary hearing took place. At this hearing, held on October 15, 2007, the State, represented by Deputy County Attorney Ryan Peters, offered its evidence. In response to the State's evidence, Defendant called Shantel Cuenca to testify. (R. 470: 42). Ms. Cuenca's testimony was substantially advantageous to Defendant as to whether she had knowingly possessed a controlled substance.[2] Essentially, Ms. Cuenca's testimony was that she was present at the incident involving Defendant on June 28, 2007; that she had also been charged with criminal offenses related to the same incident; that at that time she had not made any promises to the State as part of her plea to testify in this matter; that the drugs found at the home were hers, and not Defendant's; and that Defendant was at the location because she was the caretaker for

[2] The State's theory of possession was that of constructive possession. (R. 341, Jury Instructions).

Ms. Cuenca's children. (R. 470: 43-48). Based on Ms. Cuenca's favorable testimony, defense counsel listed her as a witness for Defendant at trial. (R. 222).

Subsequently, at trial, Ms. Cuenca switched sides and was called by the State as their witness. On September 24, 2008, the morning of the first day of trial, Mr. Peters informed defense counsel that Ms. Cuenca had changed her testimony and would be testifying on the State's behalf. (R. 473: 310). Scrambling, due to the surprise change in testimony, defense counsel immediately called his secretary to get Ms. Cuenca's criminal background and any plea agreements. (R. 473: 310-311). In that short time defense counsel found one plea agreement, which he used to impeach Ms. Cuenca. (R. 473: 311).

On May 5, 2008, more than six months prior to trial, Mr. Peters – the same deputy county attorney – arranged a plea agreement with Ms. Cuenca in exchange for her testimony against Defendant. (R. 412-13). Specifically, the State has confirmed that "[t]hrough plea negotiations, Cuenca was allowed to plead guilty to Distribution of a Controlled Substance with Prior Convictions, a first degree felony…", and in exchange Defendant agreed "to testify against Jullyn Doyle…." (R. 413). Mr. Peters approved and signed the Statement in Support of Guilty Plea, which contained this agreement. (R. 413). Mysteriously, however, when Mr. Peters questioned Ms. Cuenca regarding this plea deal he failed to correct what he must have known to be a false statement.

During the first day of trial the State called Ms. Cuenca to testify. (R. 472: 142-158). It was here, on direct examination, that Mr. Peters failed to correct a false statement from Ms. Cuenca. Specifically, Mr. Peters questioned Ms. Cuenca as follows:

Q: ***Were you ever given a deal on your charges for – in exchange for your testimony today?***

A: ***No.***

Q: Has anyone ever asked you to testify in a specific way?

A: No, I always told everybody that I wouldn't lie.

(R. 472: 158) (emphasis added). Inarguably, Mr. Peters must have known her answers to be false because he was the prosecutor that gave Ms. Cuenca the plea deal in exchange for her testimony. And in an effort to get to the truth, defense counsel had a similar exchange with Ms. Cuenca:

Q: And it's your testimony that the State didn't offer you a deal to testify against Ms. Doyle?

A: Nope.

...

Q: ... Did you take deals on those, or did you take those to trial like we're doing today?

A: Nope, I'm on a five to life.

Q: So you actually took a deal, you pled guilty?

A: Yeah, pled guilty to them.

Q: ***All right, and the State didn't offer you a deal at that time?***

A: ***Nope.***

(R. 472: 166-68) (emphasis added). Twice now Ms. Cuenca offered testimony that Mr. Peters knew to be false, but did nothing to correct it.[3]

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[3] Defense counsel waited until the morning of the second day of trial in hopes that Mr. Peters would correct Ms. Cuenca's false testimony. (R. 473: 304-05). In fact, the State recalled Ms. Cuenca, but again failed to correct the false statement. (R. 473: 305).

The following morning defense counsel brought the perjury and prosecutorial misconduct issues before the court. (R. 473: 304). After arguments on the matter, the trial court found no misconduct on the State's part and any perjury issues would be for the jury to hear. (R. 473: 321-22). After being convicted, Defendant filed a Motion to Arrest Judgment, based on good cause that the State (1) failed to provide exculpatory evidence and (2) committed prosecutorial misconduct by not correcting false testimony. (R. 395-388). Defendant's motion was denied. (R. 466-62).

Presently, Defendant asserts that the trial court abused its discretion by not granting Defendant's motions due to the extreme nature of the misconduct and because Ms. Cuenca – being a witness to the events but having made a plea deal with the State in exchange for her testimony – gave false testimony, which presents a reasonable likelihood that the judgment of the jury could be affected. See, Gordon, 886 P.3d at 116.

The trial court abused its discretion when it found Ms. Cuenca "may have believed she actually did not receive a plea deal since she was still sentenced 5 years to life at the Utah State Prison." (R. 466, 462). Defendant asserts that the trial court's findings with regards as to whether Ms. Cuenca believed her testimony to be true as irrelevant.[4]

In its findings regarding Defendant's Motion to Arrest Judgment, the trial court addressed the issues on two fronts. First, the court discussed the State's failure to provide discovery. (R. 466-62). Second, the court addressed whether Ms. Cuenca perjured

[4] The trial court applied the definition of "perjury," under Utah Code Ann. §76-8-502, to determine whether Ms. Cuenca knowingly lied under oath. What Ms. Cuenca believed, however, is not determinative of Mr. Peter's misconduct by failing to correct the false statement.

herself. Defendant asserts that first, the State's actions in not providing discovery are reprehensible, and second, the trial court's analysis of Ms. Cuenca's perjury is inapposite and fails to address Mr. Peters' misconduct.

i. The State's Failure to Comply with Utah Rule of Criminal Procedure 16 is Illustrative of Defendant's Unfair Trial.

First, the impetus for Defendant's unfair trial was the State's refusal to comply with Rule 16 of the Utah Rules of Criminal Procedure. Utah Rule of Criminal Procedure 16(a) requires the prosecutor to provide discovery material to the defendant upon request. This is a "continuous duty." Utah R. Crim. Pro. 16(b). By Statute, the State is required to provide defendants with information on a continual basis upon request. Utah R. Crim. Pro. 16(a)-(b). The Utah Supreme Court, however, has affirmed that under the Utah and Federal Constitutions, "the prosecution has a fundamental duty to disclose material, exculpatory evidence to the defense in criminal cases." State v. Bisner, 2001 UT 99, ¶32, 37 P.3d 1073 (internal quotations omitted). And that this duty to disclose "applies both to substantive exculpatory evidence *and to that which may be used for impeachment.*" Bisner, 2001 UT 99, ¶ 32 (emphasis added); see also, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Here, Defendant made that request through a specific and general discovery request, but never received the information. (R. 48; 46).

On November 15, 2007, the Defendant made a general and specific request for discovery. (R. 48; 46). Defendant requested that the State produce "[e]vidence known to the State which tends to negate or mitigate guilt of the accused" and "[a] copy of any and all written or verbal offers to any co-defendant in this case in exchange for testimony

against the Defendant." (R. 48; 46). In response, the State provided discovery to some requests and objected to others. (R. 196-192). Regarding Defendant's request for a copy of any offers to co-defendants, the State responded: "To date, no offers have been made to any codefendants in exchange for testifying against this defendant." (R. 193). That was submitted December 20, 2007.

However, between December 2007 and September 2008 (the date of trial), a plea deal had been struck between the State and a co-defendant – Ms. Cuenca. (R. 465). When Ms. Cuenca entered into the plea agreement – May 5, 2008 – the State failed to notify Defendant of that material fact until the day of trial. (R. 465). In fact, the State maintained, even after this issue came to light, that they had no duty to reveal whether the State had entered into an agreement with a co-defendant. (R. 408-404). This attitude is symptomatic of the overall problem in this case – a lack of fairness.

The Utah Supreme Court has stated that while the State is "charged with vigorously enforcing the laws..." it has an "even higher duty to see that justice is done." Walker, 624 P.2d 687, 691 (Utah 1981). So, although the State "'may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones.'" State v. Saunders, 1999 UT 59, ¶ 31 (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). To withhold – whether intentionally or negligently – critical impeachment evidence until the day of trial is a malfeasance that strikes at the core of a criminal defendant's constitutional due process right to a fair trial. See, U.S. Const. Amend. V; Utah Const. Art. I, § 7.

ii. The Trial Court Abused its Discretion by Supporting its Conclusions on the Irrelevant Fact that Ms. Cuenca Believed Her Testimony to be True

Furthermore, the trial court's findings regarding whether Ms. Cuenca believed to be the truth are inapposite. The trial court's findings state that "the State did not suborn perjury. 'Perjury' is a 'false material statement under oath or affirmation or swears or affirms the truth of a material statement previously made and he does not believe the statement to be true.'" (R. 463) (quoting Utah Code Ann. § 76-8-502). Using this as a guide, the trial court concluded that because "Cuenca may have believed she did not receive a plea deal, the Court cannot conclude that the State suborned perjury." (R. 463). Whether the State *suborned* perjury is questionable because innocently the State may not have been aware that Ms. Cuenca would testify that she had not received a plea deal in exchange for her testimony. Regardless, the statement was still false. And despite what Ms. Cuenca believed, Mr. Peters knew differently.

The fact remains that Mr. Peters *knew* that the statement was objectively false. It is beyond reproach or dispute that Ms. Cuenca did in fact enter into a plea agreement approved by Mr. Peters, which required her to testify against Defendant in this matter. And this occurred about four months prior to trial. Now, whether Mr. Peter's knew Ms. Cuenca would testify that she had not entered into an agreement is uncertain. What is certain, however, is that once Mr. Peters asked Ms. Cuenca on direct examination whether she had been offered a plea deal in exchange for her testimony and she responded in the negative, Mr. Peters had an affirmative and ethical duty as prosecutor to correct this false statement. Unfortunately, Mr. Peters failed in that duty.

In State v. Gordon, the defendant argued that the prosecutor failed to correct false testimony of two witnesses and their statements regarding the time period of when they saw the defendant. Gordon, 886 P.2d at 115. On appeal, this Court reasoned that the record adequately reflected the State's efforts "to correct the record *after* defense counsel informed the prosecutor and the trial court" of the error. Gordon, 886 P.2d at 115 (emphasis added). Conversely, here, the State must have been aware from the instant Ms. Cuenca made her statements that they were false and yet still failed to correct them, even after having the matter brought before the trial court. (R. 473: 304).

Presently, however, the State's actions are more akin to those in Walker v. State, 624 P.2d 687 (Utah 1981). In Walker, the defendant was tried and convicted of unlawful possession of a controlled substance with intent to distribute. Walker, 624 P.2d at 688. Subsequently, the defendant became aware of exculpatory evidence which would have impeached the testimony of two officers. Walker, 624 P.2d at 688-89. On direct and cross examination the officers testified that no male items were found in the residence, which would have presented the defendant with a defense to having possessed the controlled substance. Id. Later, it came to light that the prosecutor knew that the officers statements were false, yet he failed to correct the statements. Walker, 624 P.2d at 690-92.

On appeal, the Utah Supreme Court stated: "It is an accepted premise in American jurisprudence that any conviction obtained by the knowing use of false testimony is fundamentally unfair and totally incompatible with 'rudimentary demands of justice.'" Walker, 624 P.2d at 690 (quoting Mooney v. Holohan, 294 U.S. 103, 55 S.Ct.

340, 79 L.Ed. 791 (1935)). As such, the Court announced that "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury[,]" then there is reason to reverse the conviction. Walker, 624 P.2d at 690, 692.

In its analysis, the Utah Supreme Court relied on the facts of the case, which clearly demonstrated the State's reliance on false testimony for a conviction.

> The false impression which the prosecution knowingly fostered in the present case constitutes prosecutorial misconduct which seriously interfered with the trial court's truth seeking function. We believe this to be analogous to the prosecution's knowing use of false testimony and therefore subject to the same standard of materiality used in those cases.

Walker, 624 P.2d at 691. As such, the Court found there existed a "reasonable likelihood the false impression fostered by the prosecutor could have affected the judgment of the jury." Walker, 624 P.2d at 691. Consequently, the conviction was reversed and the case remanded for a new trial. Walker, 624 P.2d at 692.

Similar to the conduct of the prosecutor in Walker, Deputy County Attorney Ryan Peters reliance on false testimony for a conviction substantially impaired Defendant's right to a fair trial. As illustrated, Mr. Peters was unquestionably aware that Ms. Cuenca had reached a plea deal – one that he approved. Mr. Peters, however, never corrected this falsehood, even after being notified of it. Therefore, it is reasonable to conclude, as the Utah Supreme Court did in Walker, that the failure to correct known false testimony is analogous to the prosecution's knowing use of false testimony. 624 P.2d at 691. And because of the nature of Ms. Cuenca's testimony, her false statements could have affected the

judgment of the jury. Thus, the trial court abused its discretion in denying Defendant's Motion to Arrest Judgment.

Cumulatively, the State's failure to provide discovery under Rule 16 and its misconduct by not correcting what was a blatant falsehood impaired Defendant's right to a fair trial requires dismissal. Therefore, defendant respectfully requests that this case be dismissed. Or, in the alternative, the Defendant be afforded a new trial in accordance with Walker and Gordon.

II. The Trial Court Erred in Admitting Evidence of Doyle's Other Bad Acts under Rules 404(b) and 403 of the Utah Rules of Evidence

Over Doyle's objection, two witnesses were allowed to testify as to her prior drug use. First, Deputy Sheriff Dennis Chapman testified that on February 9, 2006—more than 16 months prior to the execution of the search warrant on the Cuenca residence—he initiated a traffic stop on Doyle where she was found to have methamphetamine in her system and where she admitted to using methamphetamine recently. (R. 473: 271-74). Second, Anna Shide, a forensic scientist, testified that she tested a blood sample collected from Doyle on August 29, 2007—two months after the warrant—that was positive for methamphetamine. (R. 473: 291-93). Doyle asserts that this testimony violates Rules 404(b) and 403 of the Utah Rules of Evidence.

"It is of course fundamental in our law that a person can be convicted only for acts committed and not because of general character or proclivity to commit bad acts." State v. Reed, 2000 UT 68, ¶ 23, 8 P.3d 1025. Utah Courts have long recognized the

prejudicial effect of prior conviction evidence. Salt Lake City v. Struhs, 2004 UT App 489, ¶ 14, 106 P.3d 188. The Utah Supreme Court has stated, "We do not doubt that 'evidence of prior convictions and other bad acts has tremendous potential to sway the finder of fact unfairly' and increases the likelihood of conviction." State v. Florez, 777 P.2d 452, 459 (Utah 1989); *see also* State v. Holder, 694 P.2d 583, 584 (Utah 1984) (per curiam) (Stating "[s]uch evidence of the commission of other crimes must be used with extreme caution because of the prejudicial effect it may have on the finder of fact"). For this reason there are "rigorous criteria" for admitting evidence of other crimes or wrongs pursuant to Rule 404(b) of the Utah Rules of Evidence. United States v. Cuch, 842 F.2d 1173, 1176 (10th Cir. 1988).

When analyzing admissibility of bad-acts evidence, a trial court must determine: (1) whether evidence is being offered for a proper, non-character purpose; (2) whether such evidence is relevant; and (3) whether evidence must be excluded as more prejudicial than probative. Utah R. Evid. 402, 403, 404(b); State v. Rees, 2004 UT App 51, ¶ 2, 88 P.3d 359 (citing State v. Decorso, 1999 UT 57, ¶ 20, 993 P.2d 837, *cert denied*, 528 U.S. 1164, 120 S.Ct. 1181 (2002)).

"Even if evidence is offered for a proper, non-character purpose and is relevant, the court must determine whether the probative value of the evidence 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" State v. Nelson-Waggoner, 2000 UT 59, ¶ 20, 6 P.3d 1120 (quoting Utah R. Evid. 403). Accordingly, even if Brown's prior conviction of retail theft had been offered for a

proper purpose and was relevant, it was more prejudicial than probative under the third prong of the analysis.

To be admissible, the prior bad act evidence "must have real probative value, not just possible worth." United States v. Hogue, 827 F.2d 660, 662 (10th Cir. 1987); United States v. Morales-Quinones, 812 F.2d 604, 612 (10th Cir. 1987). Even if the prior conviction has real probative value, however, it is inadmissible if its prejudicial effect substantially outweighs such probative value. Moreover, when certain actions of a current charge are similar to a previous conviction, unless those similarities are "peculiarly distinctive of defendant's conduct" and not just of the type of crime committed, the similarities between the two cannot be found to constitute a common design or modus operandi. State v. Cox, 787 P.2d 4, 6 (Utah App. 1990).

The trial court denied Doyle's motion to exclude the above-referenced testimony based upon the following:

> The State is not seeking to introduce the evidence of the other bad acts to establish character that conforms with the actions alleged in the current case. Rather, the State is seeking to introduce the evidence for non-character purposes—i.e., to show ownership or possession of the methamphetamine found in this case, to establish that the items found with the drugs are in fact drug paraphernalia (as expressly allowed by statute), and other non-character purposes.
>
> The evidence proposed by the State is clearly relevant under Rule 402 because it tends to make the existence of a fact of consequence in this matter—the

possession or ownership of the drugs—more or less probable than it would be without the evidence. *See* URCrP 401.

Finally, the probative value of the evidence outweighs any unfair prejudicial effect. The Court notes that all the evidence the State will submit against the defendant is prejudicial, but Rule 403 only excludes "unfair prejudice." The Court finds that the evidence is not unfairly prejudicial and is therefore proper.

(R. 242-240). Doyle asserts that the rationale behind the trial court ruling is exactly what Rules 404(b) and 403 are designed to prohibit.

Doyle was charged with constructive possession of methamphetamine and paraphernalia due to her presence at a residence where a search warrant was executed. By the trial court's own admission, he admitted evidence of two other occasions where Doyle either admitted to methamphetamine use and/or tested positive for methamphetamine precisely to prove that she possessed or owned the drugs at issue on the date and time at issue in the trial. In other words, he admitted these other bad acts to prove that Doyle on this occasion acted in conformity with these other two occasions. This is in direct violation of Rule 404(b). Furthermore, "ownership or possession" is not a purpose for which such evidence is allowed under Rule 404(b). Moreover, whether the pipes or baggies were drug paraphernalia was not at issue. There was no argument that those items were not paraphernalia. In fact, those items, by their very nature were unquestionably paraphernalia. The baggies had drugs inside and glass pipes have very few if any legitimate uses—particularly not when residue is located inside.

Additionally, any probative value of Doyle's drug use on other occasions is substantially outweighed by the danger of unfair prejudice. The Utah Supreme Court has stated that evidence of other bad acts has "'tremendous potential to sway the finder of fact unfairly' and increases the likelihood of conviction." State v. Florez, 777 P.2d 452, 459 (Utah 1989). Accordingly, several factors have been established to assist in the determination of whether evidence of other crimes or bad acts should be excluded under Rule 403. These include: (1) the strength of the evidence as to the commission of the other crime, (2) the similarities between the crimes, (3) the interval of time that has elapsed between the crimes, (4) the need for the evidence, (5) the efficacy of alternative proof, and (6) the degree to which the evidence probably will rouse the jury to overmastering hostility. State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988); *see also* Decorso, 1999 UT 57 at ¶ 29, 993 P.2d 837, State v. Cox, 787 P.2d 4, 5 (Utah App. 1990). Doyle asserts that these factors clearly weigh against admission.

One, the only similarities between this alleged crime and the other bad acts are that all of them involve methamphetamine. Neither of the other two acts involved constructive possession or ownership, or a search warrant. Two, is the interval of time that has elapsed between the incidences. Doyle's admission to Chapman of recent drug use and that subsequent positive test for methamphetamine occurred more than sixteen months prior to her presence at Cuenca's residence; and the other positive test took place two months after. Three, the only true purpose of allowing testimony of Doyle's other acts involving methamphetamine was to rouse the jury to overmastering hostility towards her as a "drug addict."

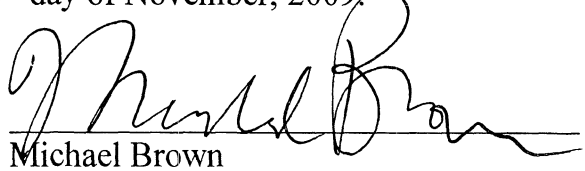
The trial court failed to establish a non-character purpose that would justify admitting evidence of these other bad acts at trial. Indeed, the trial court's ruling clearly establishes that this evidence was admitted to establish that because Doyle had used methamphetamine on other occasions, she must have owned, possessed or used the methamphetamine at issue here: Once a drug user, always a drug user.

Furthermore, the trial court did not carefully balance the probative value of the evidence against its prejudicial effect. The trial court should have concluded that the probative value of other acts was slight in comparison to the substantial prejudicial effect. Because this error is such that there was a "reasonable likelihood of a more favorable result for the defendant in its absence," Doyles requests that this Court reverse her conviction. State v. Bruce, 779 P.2d 646, 656 (Utah 1989).

CONCLUSION AND PRECISE RELIEF SOUGHT

Johnson requests that this Court reverse the trial court's denial of his motion to suppress and remand this case to the Fourth District Court for further proceedings.

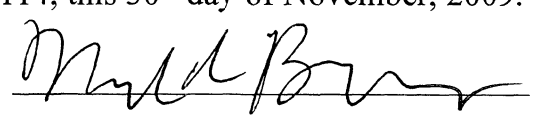
RESPECTFULLY SUBMITTED this 30th day of November, 2009.



Michael Brown
Michael D. Esplin

CERTIFICATE OF MAILING

I hereby certify that I delivered two true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 30th day of November, 2009.



ADDENDA

JEFFREY R. BUHMAN, #7041
Utah County Attorney
TIMOTHY L. TAYLOR, #8001
100 East Center Street, Suite 2100
Provo, Utah 84606
Telephone: (801) 851-8026
Fax: (801) 851-8051

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. JULLYN DOYLE, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER Case No. 071402824 JUDGE Darold J. McDade

This case is before the Court on the defendant's Motion to Arrest Judgment. Aaron Dodd represented the defendant and Timothy Taylor represented the State of Utah.

STATEMENT OF FACTS

1. On September 24 and 25, 2008, a jury trial was held wherein the defendant was convicted of Possession of a Controlled Substance, a third degree felony, and Possession of Drug Paraphernalia, a class A misdemeanor.

2. On or about November 17, 2008, prior to the imposition of a sentence, the defendant filed a Motion to Arrest Judgment. The defendant invoked two separate arguments in favor of his Motion to Arrest Judgment: 1) That the State of Utah failed to provide exculpatory evidence after

the defendant had filed a Specific Request for Discovery inquiring into any plea deals with the co-defendant in the case, and; 2) that the State of Utah suborned perjury by failing to correct alleged false testimony by a co-defendant.

3. On or about December 10, 2008, the State of Utah filed a Memorandum in Opposition to Defendant's Motion to Arrest Judgment.

4. On or about December 19, 2008, the defendant filed a Reply to State's Opposition to Defendant's Motion to Arrest Judgment.

5. On or about December 29, 2008, the State filed a Supplemental Memorandum in Response to Defendant's Motion to Arrest Judgment.

6. On January 12, 2009, the court received oral arguments from the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the aforementioned documents and receiving arguments from the parties, the Court makes the following findings of fact and conclusions of law:

1. The Court finds that on or about November 15, 2007, the defendant filed a Specific Request for Discovery asking the State to provide a copy of any agreements between the State and the co-defendants in exchange for testifying against the defendant. At this point in the proceedings, the State responded indicating, "To date, no offers have been made to any co-defendants in exchange for testifying against this defendant."

2. On or about May 5, 2008, Shantel Cuenca "Cuenca", a co-defendant in the present case, pled guilty in two unrelated cases. In case 081401078, Cuenca plead guilty to Distribution

of a Controlled Substance with Prior Convictions, a first degree felony and False Information to a Peace Officer, a class C misdemeanor. In case number 081401181, Cuenca pled guilty to Possession of a Controlled Substance in Drug Free Zone, a second degree felony. As part of this plea deal, Cuenca agreed to "testify against Jullyn Doyle and Jorge Navarrette-Lopez." Cuenca waived time for sentencing and was sentenced to the Utah State Prison with the aforementioned cases running concurrently with each other.

3. On or about September 12, 2008, the State filed a Supplemental Response to Defendant's Specific Request for Discovery as it related to any possible plea deal with the co-defendant. In part, the State indicated, "The State objects to this request due to the fact that the items requested are not discoverable." The defendant did not object to the State's response neither did it seek the State to compel with its discovery request.

4. The Court finds that upon receiving the State's objection to provide discovery, the defendant could have objected or filed a Motion to Compel in order to discover the details of any possible plea deal between Cuenca and the State. Therefore, the defendant was put on notice by the State of a possible plea deal with Cuenca but the defendant failed to further address this issue before the trial began. However, the Court also finds that any failure by the State to provide information regarding a plea deal with the co-defendant was cured when defense counsel thoroughly explored the details of Cuenca's plea deal during the trial by examining both Cuenca and the Cuenca's legal counsel in front of the jury.

5. This Court specifically finds support for its decision in the case of *State v. Bisner*, 37 P.3d 1073, (Utah 2001). In this case the Utah Supreme Court stated:

> Despite the strictures imposed on prosecutors by this constitutional duty of disclosure, the United States Supreme Court has held that it is in the specific instance where there is discovery *after trial*, of information which had been known to the prosecution but unknown to the defense that reversal of a conviction for nondisclosure is required. Accordingly, courts universally refuse to overturn convictions where the evidence at issue is known to the defense prior to or during trial, where the defendant reasonably should have known of the evidence, or where the defense had the opportunity to use the evidence to its advantage during the trial but failed to do so.

Id at 1082-83. (emphasis in original).

Since the defendant learned of a possible plea deal before trial but also thoroughly examined the details of the plea deal during the trial, this Court finds the State of Utah did not fail to provide the defendant with exculpatory evidence and the defendant's due process rights were not violated.

6. The Court finds that the case of *Napue v. Illinois*, 360 U.S. 264 (1959), is distinguishable to the case at hand due to the fact that the defendant in *Napue* did not discover exculpatory evidence known by the prosecutor until after the case was completed. Therefore, the Court finds that *Napue* is not controlling based on the facts in the present case.

7. The Court also finds that the State did not suborn perjury. "Perjury" is a "false material statement under oath or affirmation or swears or affirms the truth of a material statement previously made and he does not believe the statement to be true." Utah Code Ann. §76-8-502.

8. Shantel Cuenca was charged with a first degree felony and ultimately ended up pleading to a first degree felony. The difference between the original charge and her plea was the dismissal of a drug free zone which removed the penalty from a mandatory 5 years to life to a

penalty of not less than 5 years to life. The Court finds that when Cuenca indicated she did not receive a plea deal in exchange for her testimony, she may have believed she actually did not receive a plea deal since she was still sentenced 5 years to life at the Utah State Prison. Since Cuenca may have believed she did not receive a plea deal, the Court cannot conclude that the State suborned perjury.

ORDER

Based on the aforementioned findings of fact and conclusions of law, the Court finds there is not a good cause to arrest judgment pursuant to Rule 23 of the Utah Rules of Criminal Procedure and the defendant's Motion to Arrest Judgment is hereby DENIED.

DATED this 20 day of February, 2009.

BY THE COURT
DARROLD J. McDADE

Approved as to form:

Aaron P. Dodd
Attorney for Defendant

JEFFREY R. BUHMAN, No. 7041
Utah County Attorney
RYAN V. PETERS, No. 10683
Deputy Utah County Attorney
100 East Center Street, Suite 2100
Provo, Utah 84606
Telephone: (801) 851-8026

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

STATE OF UTAH, Plaintiff, v. JULLYN DOYLE, Defendant.	**ORDER ON DEFENDANT'S MOTION TO EXCLUDE PRIOR BAD ACTS EVIDENCE** Case No. 071402824 Judge Darold J. McDade

This matter comes before the Court on the defendant's Motion in Limine to Exclude Prior Bad Acts. Having been fully briefed and argued before the Court, the Motion is ripe for decision.

The State put the defendant on notice that it intends to introduce the following bad acts evidence under Utah Rule of Criminal Procedure 404(b) at trial:

1. A 2006 DUI conviction wherein the defendant was convicted of driving while under the influence of methamphetamine.
2. Statements made by the defendant when she was arrested in 2006 for DUI to the effect that she had consumed methamphetamine.

3. Toxicology report from the 2006 DUI arrest showing the presence of methamphetamine in the defendant's blood.

4. Toxicology report from an August 2007 arrest for DUI, showing the presence of methamphetamine in the defendant's blood.

The defendant moved to exclude such evidence claiming the evidence is improper under Rule 404(b).

"In deciding whether evidence of other crimes is admissible under rule 404(b), the trial court must determine (1) whether such evidence is being offered for a proper, non-character purpose under 404(b), (2) whether such evidence meets the requirements of rule 402, and (3) whether this evidence meets the requirements of rule 403." *State v. Cox*, 169 P.3d 806, 813 (Utah Ct. App. 2007) (citations omitted).

The Court denies the defendant's motion based upon the following:

The State is not seeking to introduce the evidence of other bad acts to establish character that conforms with the actions alleged in the current case. Rather, the State is seeking to introduce such evidence for non-character purposes–i.e., to show ownership or possession of the methamphetamine found in this case, to establish that the items found with the drugs are in fact drug paraphernalia (as expressly allowed by statute), and other non-character purposes.

The evidence proposed by the State is clearly relevant under Rule 402 because it tends to make the existence of a fact of consequence in this matter–the possession or ownership of the drugs–more or less probable than it would be without the evidence. *See* URCrP 401.

Finally, the probative value of the evidence outweighs any unfair prejudicial effect The Court notes that all the evidence the State will submit against the defendant is prejudicial, but Rule 403 only excludes "unfair prejudice." The Court finds that the evidence is not unfairly prejudicial and is therefore proper.

Therefore, the Court DENIES the defendant's motion to exclude the prior bad acts mentioned in this order and the State may introduce the same at trial.

Dated this day:_____

BY THE COURT:

DAROLD J. McDADE
DISTRICT COURT JUDGE

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH, Plaintiff, vs. JULLYN DOYLE, Defendant.	Case No. 071402824 FS (Volume II)

Jury Trial
Electronically Recorded on
September 25, 2008

BEFORE: THE HONORABLE DAROLD MCDADE
Fourth District Court Judge

APPEARANCES

For the State:
Sherry E. Ragan
UTAH COUNTY ATTORNEY'S OFFICE
100 East Center Street
Suite 2100
Provo, Utah 84606
Telephone: (801)851-8026

For the Defendant:
Aaron F. Dodd
FILLMORE, SPENCER
3301 North University Avenue
Provo, Utah 84604
Telephone: (801)426-8200

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

to determine, and that she has presented direct evidence -- not just circumstantial, but direct evidence on the issue of whether these crimes were committed by the defendant, and we would ask the Judge -- the Court to allow the defendants to weigh her credibility

THE COURT Anything else, Mr Dodd?

MR DODD No, your Honor

THE COURT It would be the Court's finding that there is sufficient evidence to proceed I'll deny the motion to dismiss and the motion for a directed verdict.

MR. DODD Your Honor, may I approach?

THE COURT. Yes

MR. DODD Your Honor, I have a serious matter to bring to the Court's attention today. The State calls its witness Shantel Cuenca. Shantel Cuenca testified on the stand that she in fact had no deal from the State to testify against my client. Your Honor, that falls -- that testimony was entirely false.

Your Honor, I'm submitting a plea agreement that Shantel Cuenca entered into the Court May 5th of 2008 in front of your Honor, and her attorney was Gunda Jarvis, who was present. That plea agreement states that in fact she is receiving a beneficial plea from the State in exchange for testimony from my client

Your Honor, this motion goes on to explain that under

Nakua vs. Illinois, a United States Supreme Court case from 1959, citation 360 US 264, it's a due process violation, a violation of my client's Constitutional Rights to a fair trial, for the State to suborn perjury from its main witness.

Your Honor, I was hopeful that the State would correct this testimony. I was hopeful this morning when we approached your Honor that the State would come back, explaining what was going on. I was advised to bring this to your attention at the very beginning this morning; but I waited. I waited to see if the State was going to correct the false testimony today.

When the State called Ms. Cuenca back, I expected them to put her on the stand and correct the false testimony that was given. It did not happen. The State has not corrected her testimony. Your Honor, she lied on the stand. She sat there and she told the jury that she did not receive this -- any deal from the State, and that was entirely false. It was entirely false.

She knew -- I can call Ms. Gunda to the stand -- Ms. Jarvis to the stand. She knew, in fact, that she received a deal from the State in exchange for testimony against my client. She perjured herself on the stand. The State has allowed that perjured testimony to go forward.

Your Honor, not only -- I mean, this shouldn't even go to the jury. This should be dismissed. The State's main witness, the one that really is fingering out, the only one

that can finger out my client, whose testimony has since changed -- she's changed her testimony, and that testimony has changed from the time that she entered this plea deal.

Your Honor, if you recall, I subpoenaed Ms. Cuenca. It was my understanding she was going to testify favorably all along. I was the one that called Ms. Cuenca at the preliminary hearing. I was the one that asked for the questions, because she was favorable to my client. It wasn't until she entered this plea deal that she changed her testimony, and now she points the finger at my client.

She has perjured herself. The State has not corrected that testimony. The State has not attempted to correct that testimony. It is a complete violation of my client's rights, and the United States Supreme Court, as interpreting the Constitution, demands that this case be dismissed.

THE COURT: Is the State receiving this for the first time?

MR. PETERS: Yes.

THE COURT: Do you need some time to look it over, or do you want to respond now?

MR. PETERS: I can respond now. Judge, it looks like on the 11th of September 2008 the State filed a supplemental response to the defendant's specific request for discovery. In that, and I'll read it -- I don't have copies because I was not anticipating this motion.

The State says, "The State specifically objects to item No. 2, hereinafter request No. 2 listed in the defendant's specific request for discovery, wherein the defendant requested a copy of any and all written and verbal offers to any co-defendant in this case, in exchange for testimony against the defendant. If any verbal offer was submitted to any co-defendant, please include the date, time that the offer was provided, and the name of the person making that offer "

That was a request made by the defense well on early in the case. I hadn't decided whether or not I was going to call Ms. Cuenca in this case; but when I did, in September, I filed this objection to their request; and I believe it has been filed with the Court. "The State objects to this request due to the fact that the items requested are not discoverable. The rules of discovery in a criminal case are laid out in the Rules of -- Utah Rules of Criminal Procedure 16.

"Rule 60(a) states the prosecutor must disclose the following material: statements of co-defendants or defendants, criminal record of the defendant, physical evidence seized from the defendant or co-defendants, exculpatory evidence, or any other item which the Court finds good cause, the defendant should have available. Request No. 2 does not fall with any -- in any of these specifically enumerated categories. Therefore, the State objects to defendant's discovery request No. 2."

The State clearly objected to this request. Now, when

I asked Ms. Cuenca if she was given a deal on the stand, I believe the testimony was, "What is your understanding of any deal that took place?" I am test -- I can call officer Barson, I can call Ms. Ragan, that when we were back discussing it with her, that was what I requested, "What is your understanding of the deal that you were given in this case, if any?" Her exact response was, "Nothing. I don't believe I was given anything. I went to prison." I don't feel I was given anything.

I don't believe the State has suborn perjury in this case. We have clearly put the defendant on notice that we weren't going to give him notice of any deals unless he brought it to this Court's attention, which he did not, prior to trial. September 11th, that was what, two -- two full weeks ago that he's had plenty of time to do that.

That's what I'm trying to get to, Judge. My question to her was what was her understanding of a deal, if any, given. That was certainly what the State intended. It's not what the deal was. In order to get that into evidence, I would have to call her attorney, which would violate attorney/client privilege, because she obviously didn't understand what her deal was. I would also possibly have to call other attorneys that were involved in the case, and quite possibly this Court, because she pled guilty in this Court and signed the plea agreement in this Court.

So I don't believe that the State has suborn perjury.

Again, we have clearly put the defendant on notice that we were not going to tell him what options we were, and we don't have to unless he makes an objection prior to trial, a motion, and the Court finds that there's good cause and forces us to do so That has not taken place today, has not taken place prior to today, and we would object to this motion to dismiss

MR DODD Your Honor, the Court is required, under the Rules of Evidence and under due process, under the State's Rules of evidence as well, to provide to the defendant any exculpatory information The State knows that I called her as my witness at the preliminary hearing The State knows that I was intending to call her, because I subpoenaed her. I was the one that started the motion to get her here, to Court to this trial

The State was well aware -- because if you'll read that plea agreement you'll see which is the prosecutor that signed that deal before your Honor The State is aware that that is exculpatory information Besides the fact that they objected to my request, that objection was not valid. I didn't have to do anything further, but that's missing the entire point The entire point is, Ryan Peters asked her if she got a deal, and she said, "No " That was false testimony.

Did they ever tell me that that was false testimony? I was waiting, I was hoping that they would tell me that that was false testimony, and I can bring witnesses in to that fact,

that I alerted other attorneys at my office of what was going on, and I was concerned, and they were concerned, and thought what should we do. They advised me to come to you this morning. I thought about it all last night, and I didn't want to do that. I wanted to give them the chance to clean up their mistake, and I was hopeful that they would.

Your Honor, the jury has heard their key witness perjure themselves, and the State did absolutely nothing. I was hopeful, I was anxious, and I asked on the sidebar, when the State said that they were going to call Shantel Cuenca again, I said, "Ryan, what's the purpose -- why are you calling her?" I was hoping for him to say, "Hey, I've got to clear up something. There was -- you know, some -- she didn't testify exactly right." I was hoping he was going to do it. I was waiting for him to do it. That I wouldn't have to file this motion.

Regardless of whether I was on notice or not, your Honor, I checked the criminal background of every one of these co-defendants but Shantel Cuenca, previous to this trial. I didn't do it because she was my witness. When I learned that she had turned yesterday morning, when Mr. Peters told me, "You know what, she changed her testimony; she's on our side now," I had to call my secretary right then. I said, "You've got to give me all of her criminal background right now, this instant, any plea deals."

He was able to come down and find one plea agreement I don't know the status of the other cases that she entered into, but he gave me that, and got a certified copy of it and gave it to me If you recall, I asked Ms. Cuenca, "Wait a minute. Are you sure? Are you sure the State is not giving you a deal? Are you sure you don't want to change your testimony? Are you absolutely sure that your testimony is truthful? You mean to tell me the State didn't give you any deal?"

I asked her, if you remember, several different ways. We can pull it up on the testimony, on the record. We can pull Mr. Peters questions to her. It wasn't like "What's your understanding?" It was, "Did the State give you a deal?" "No." I was incredibly reluctant to bring this motion, but I -- and I gave the benefit of the doubt as much as I could, but I was forced to. I couldn't do anything else.

Your Honor, if you want to take some time and read through the case that I submitted from the United States Supreme Court, I request that you do that. I think you have really no other option but to dismiss this case.

THE COURT: Anything further, Mr. Peters?

MR. DODD: Your Honor, if I -- I would like to call Ms. Jarvis to the stand, so she can testify regarding what she informed her client in taking this deal.

MR PETERS Well, Judge, I think that would cure the

problem, that Mr. Dodd seems to believe is here, by being able to impeach Ms. Cuenca through another witness. Perjury is defined -- and I can't find the exact section right now, your Honor, but perjury is defined as a statement made in an official proceeding that the witness believes to be false at the time she makes it.

Again, I can call several witnesses that can say that she did not believe that her statement was false. I don't believe perjury was committed here. If the Court wants to allow me a few moments to find the section for perjury, and look at the elements, I can do that; but perjury was not committed here. She only has the ability to testify to what was in her knowledge. So I don't believe perjury was committed.

Without perjury being committed -- whether or not the fact is true or not, isn't the issue. The fact is whether somebody lied about it. The way you lie about it, the statute says, is that you know what you're saying is false. He had the opportunity to question her several times. As he says, several statements, trying to hit it from every side to see if the statement that she made she knew was false. She, every time, said, "No, I haven't been given a deal."

Now, he's more than -- more than allowed to call Ms. Jarvis to come to the stand and impeach her. I don't think that's an issue. I'm not objecting to that; but the

witness has to be able to testify from her own observations of what she understands to be the case. I don't believe that the State has done anything wrong in this case.

THE COURT: Anything other than you've already said?

MR. DODD: Your Honor, in Napua vs. Illinois, just a short summary of this case -- there's a much more serious case than this, but again, this case reminds me of (inaudible) was a murder case. So a man's life was on the line A co-defendant had already been convicted and put to death. Granted, not as serious, but still, she's facing zero to five. Her liberty is at stake.

Just on the summary it states that a witness got up on the stand and testified that he didn't get a deal. He didn't get a deal from the State in exchange for his testimony. It was the same prosecutor that asked those questions that was the one that gave him that deal. It's the exact same case here, your Honor.

The same prosecutor that gave this witness the deal, allowed the testimony to come out that, "No, I didn't get a deal for exchange of my testimony. I'm just here to tell the truth. I'm tired of my ways. I'm just here to tell the truth." This case is right on point. It's strikingly on point.

I don't hear -- I just hear excuses. I just hear, "Oh, well maybe she didn't understand," or -- her testimony is

what it is; and the jury clearly understood what her testimony was. "I didn't receive any consideration. I didn't receive a deal in exchange for my testimony."

If the Court needs to, your Honor, you're the one that took the plea deal; and like every one you do, you follow their crime. It's a Rule 11. You ask if they understand. You repeat to them the plea deal that they're getting. The State or defense Counsel puts on the record that this is in fact in exchange for testimony against Jullyn Doyle, as it says.

She was charged with a first-degree case. She was charged with possession of a dangerous weapon by a restricted person. These are serious charges. It was reduced down to a second-degree felony, and other cases -- other charges were dropped. She got a deal in exchange for testimony against my client. Simple as that, and she lied. It was false testimony; and the State allowed it to happen and did nothing to stop it.

MR. PETERS: Judge, I would like to respond, because Counsel has deemed it to ambush us with this at this point in time, and we note that --

MR. DODD: Your Honor, ambushed? I'm the one that's being ambushed.

THE COURT: Sit down, sit down.

MR. PETERS: -- that Counsel had plenty of opportunity to take this and impeach Ms. Cuenca by himself. He could have called her on the stand and said, "Yesterday you testified

there was no deal. Do you recognize this? Is that your signature? What does it say the deal is?" Yet no, he decides to go the route of waiting until now to throw this on us.

THE COURT: He can argue his case the way he chooses to argue his case.

MR. PETERS: I agree, but I think I ought to be able to respond. Second of all, Judge --

THE COURT: I asked you before if you needed some time to take to respond, and you said, "No, I'll go ahead and do it right now." So that's your response.

MR. PETERS: Can I have an opportunity to look at that? Because there were two cases that Ms. Cuenca pled guilty in that day --

THE COURT: What do you need to look at?

MR. PETERS: The plea agreement, because it is my recollection that she pled to a first-degree felony in a separate case.

(Counsel conferring off the record)

MR. PETERS: This doesn't include the other case. Perhaps I should rethink my response and ask that we be able to go down and get the other case to show that she did plea to a first-degree felony. She was charged with a first-degree felony. She pled to a first-degree felony.

Now, in full disclosure to the Court, it was a first-degree felony that required, I think -- well, before saying

that, I better look at the plea agreement, if I could have -- take back and have some time to pull the other plea agreement?

THE COURT. I don't have a problem with that You can go ahead and take what time you need to figure out what you want to do. The motion is on the table. We'll take a recess and look at 11:30. If you need a little bit more time than that, make the request; but for now, 11:30, okay? Be in recess.

COURT BAILIFF: All rise.

(Recess taken)

THE COURT: Okay, we're back on the record. Mr. Peters, did you want to make an additional response to the motion to dismiss?

MR. PETERS: Yes, Judge. I have here a certified copy of a plea deal that was reached simultaneously with the only one that the Judge has provided, interestingly enough. In that plea deal, Ms. Cuenca pled guilty to a first-degree felony. She was charged with a first-degree felony, and she pled guilty to a first-degree felony.

In addition, on that plea deal it says the maximum -- the minimum, max to -- punishment, five to life in prison. I'm sure the Court can recall, and we can recall the tape if possible, that Ms. Cuenca, when she was on the stand said, "As close as I can remember, I didn't get anything. I got five to life." Seems to be quite consistent with the simultaneous plea

deal that was entered into, I believe the exact same day. Let me just check the dates for that, your Honor.

I think that Mr Dodd clearly questioned her on the issue of whether or not she got concurrent sentencings, and in my view I think it was established that she did get concurrent sentencing, which is I guess a plea deal of sorts, and that was on the record.

So Judge, it's not that far of a stretch for a person who's charged with a first-degree felony and pleads to a first-degree felony, and who knows that she's getting five to life to say, "I didn't get a deal." Now, for the record, it was actually a first-degree felony that required some mandatory prison time. She was charged with distribution of meth in a drug-free zone with a prior. That particular combination of charges requires mandatory prison time. I believe it's seven years. I'm not sure on that.

The State did agree to not -- to drop the drug-free zone, which didn't change the charge. It was still a first-degree felony, because she had a prior distribution, and it brought the mandatory prison from seven years down to five years. Five to life, precisely what Ms. Cuenca testified to earlier.

The only -- and I believe I've given the Court a certified copy, as well as Mr. Dodd -- or a copy. I don't think Mr. Dodd's copy is certified. I believe that there's a

lot going on here, and that when a person pleads guilty to a first-degree felony and a second-degree felony, and they run it concurrent, and she's given five years to live in prison as the sentence on that, and then she comes and testifies, "I didn't get anything, I pled to what I was charged with," I don't think is a stretch to believe that she believed that she pled to what she was charged with It wasn't reduced in any kind -- any sort of degree. The prison time that she understood is precisely what's in the plea agreement.

Judge, I don't think there's a clear case of perjury here; and because of that, I would ask that the motion to dismiss be denied.

THE COURT: Do you want this motion filed then?

MR. DODD: Yes. Your Honor, as I mentioned before, in maybe a little more detail, you know, I went to bed last night with a heavy heart, not knowing what to do about this. Now Counsel's asserting -- seems to be asserting that I've attempted to mislead you by only giving you one document. That I only supplied your Honor with one statement, and that I left out the statement that Shantel Cuenca has given to you.

Your Honor, as I discussed yesterday, yesterday morning I fully expected Shantel Cuenca to testify favorably to my client When I found out that was not so, I called my secretary Daniel Price, and said, "Daniel, I need you to look up and see if she has any other convictions, and I need you to

look up and find out if she has any plea agreements with the State, and I need it now."

He came down and he found one, the one I handed you. He said, "This is all I could find " He said, "There's some other stuff, but I, you know, didn't get it." That's all I had. I didn't know if there was -- I didn't know what the deal was

He just said that she pled guilty to a second degree, and that she was -- in exchange for testimony. I didn't know what the original charges was, I didn't know what other -- he said she has some other felony convictions. I didn't know what the deals were. So I asked her on the stand whether or not she got any sentencing, concurrent or consecutive, because I didn't know. I was asking her, trying to prod her memory to see if she was going to testify truthfully.

Now, the State asserts, "Well, it's not really a deal, your Honor. So she really wasn't telling the jury a lie, because, hey, look, she pled to a first-degree five to life. She's in prison for a long time. We didn't give her a deal, and you know, we didn't even drop any charges." That is untrue.

Charges were dropped on this one. I've been since able to look at it, looked it up. Charges on this, they dropped a paraphernalia charge on this one, they dropped drug-free zone language. On the other case I did hand you, it was

pled down from a first-degree. I was able to see that last night, and see what was there, what charges were there.

Ludicrous to assert that I'm trying to -- or seem to assert that I'm trying to give you false information by only giving you one plea agreement. This plea agreement that they've given, what does it say? The State agrees to amend Count I. It's amended. Obviously it's a lesser charge. "I will plead to Count III." The remaining counts will be dismissed. "The State agrees to recommend that we proceed with sentencing today." State allowed her to be sentenced then. "I agree to testify against Jullyn Doyle," May 5th, same date. Testimony changed.

It can't be any clearer. Whether or not she understood it, I'm ready to call Ms. Jarvis, and I request to call her. The jury clearly heard, though, clearly heard from Ms. Cuenca, "I'm here of my own free will and choice. I'm just a good citizen and I'm telling you that Jullyn Doyle smoked meth," change of testimony. "No State didn't give me a deal for this."

These documents prove otherwise. They prove otherwise that she was given a deal in exchange to testify against Jullyn Doyle. How much clearer can it be? Request to be able to call Ms Jarvis to the stand to testify.

THE COURT: You can call Ms. Jarvis when the jury comes back in. That's your case, not before me. If you want to

impeach Ms. Cuenca, you need to do that in front of the jury --

MR. DODD: I --

THE COURT: -- not before the Court.

MR. DODD: -- certainly request that, your Honor, but the State is alleging that somehow Cuenca didn't think she was getting a deal. I'd like to call Ms. Jarvis to be able to testify of what she does --

THE COURT: You can do --

MR. DODD: -- with every one of her clients.

THE COURT: -- that before the jury. You're asking me to make a finding of fact in a case that the jury hasn't heard your side.

MR. DODD: No, your Honor.

THE COURT: As far as the argument you're making --

MR. DODD: I'm asking you --

THE COURT: -- if you want to impeach Ms. Cuenca, you need to do it in front of the jury.

MR. DODD: I'm not asking to impeach Ms. Cuenca. I'm asking to present evidence to this Court that there was perjury.

THE COURT: I don't find misconduct on the part of the State, number one. Whether or not she committed perjury is an issue for the jury to hear. You made your arguments. That's my finding. As far as discovery goes, you have that ability, as well as the State, to pick up discovery. That's the bottom

line.

Your motion, I read through it carefully. I read the case. The case involved a post conviction motion The whole case hadn't been tried. This is different. You're bringing in this motion in the middle of the case. If you want to impeach Ms. Cuenca, do it in front of the jury. They're the finders of fact.

MR. DODD: Your Honor, in the alternative I'll move for a mistrial due to prosecutorial misconduct.

THE COURT: Denied.

MR. DODD: Thank you.

THE COURT: You motion to dismiss is also denied.

MR. DODD: Thank you.

THE COURT: Do we need to take a break, or do we need to -- how many -- can you present your next witness, Mr. Dodd, within the next 40 minutes? Can we get that done before we take a lunch break, or do you need -- should we just take a lunch now and come back?

MR. DODD: I think we should take a lunch break now.

THE COURT: Okay.

MR. PETERS: I would request the same.

THE COURT: All right. We'll go ahead and recess, then, for lunch. Let's return at -- is 1 o'clock enough time for everybody?

MR. DODD: Yes.